STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

KIMBERLY TOPSKI, by her guardian,
EUGENIA TOPSKI; EUGENIA TOPSKI
and KT NURSING, INC.,

Plaintiffs,

vs. Case No. 2005-4342-~~CZ~~ NF

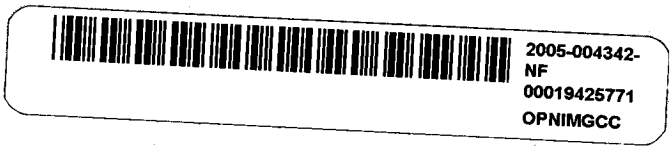
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.
_____/

OPINION AND ORDER

Defendant State Farm Mutual Automobile Insurance Company ("State Farm") moves for partial summary disposition.

Plaintiffs filed their complaint on October 28, 2005, seeking first-party personal protection insurance benefits for plaintiff Kimberly Topski. Plaintiffs allege Kimberly was injured in an automobile accident that occurred on September 6, 1981. Plaintiffs contend Kimberly is disabled and on a ventilator, requiring constant care. Plaintiffs assert Eugenia Topski, Kimberly's mother and guardian, provides care, as well as KT Nursing, Inc. Plaintiffs contend that in 2004, State Farm requested that billings be invoiced in different manners. Plaintiffs assert that after indicating on October 29, 2004, that the revised billing format was appropriate, it unreasonably cut the hourly fee for various nursing care provided by KT's Nursing, requesting that it be resubmitted, and unilaterally decreased the amounts which it was paying from those invoices. Plaintiffs aver state Farm issued a final letter of denial for certain



amounts on December 17, 2004. Defendant State Farm now moves for partial summary disposition.

Defendant State Farm argues that plaintiff Kimberly Topski's ("plaintiff") recovery for PIP benefits is limited by MCL 500.3145(1) to those benefits occurring within one year prior to the filing of the complaint. As such, defendant contends, plaintiff is barred from claiming benefits prior to October 28, 2004. Defendant notes that the Supreme Court, in *Lewis v DAIIE*, 426 Mich 93; 393 NW2d 167 (1986), had previously ruled that judicial tolling applied to the "one year back" statute of limitations of the No Fault Act, and held that the limitations period is tolled from the date the claimant makes the claim until the date the insurer formally denies liability. However, defendant asserts, on July 29, 2005, the Michigan Supreme Court issued *Devillers v Auto Club Ins Assoc*, 473 Mich 562; 702 NW2d 539 (2005), in which it renounced the judicial tolling rule found in *Lewis* and ruled that the one-year back rule is to be strictly applied. Defendant thus concludes that since plaintiff did not file this suit until October 28, 2005, any claim she may have had which pre-dates October 28, 2004, is time-barred.

Plaintiff responds, first, that she has been in a permanent quadriplegia ventilatory-dependent state since the accident, and is incapacitated pursuant to MCL 600.5851; her mother represents her. Plaintiff avers she is incapacitated pursuant to MCL 600.5851 as she suffers a condition of mental derangement such as to prevent her from comprehending her rights. Plaintiff asserts that the statute of limitations in plaintiff's claims brought pursuant to MCL 500.3145 are tolled by the language of 600.5851(1) which reads that if the person first entitled to bring an action is "insane" at the time the claim accrues the person shall have one year after the disability is removed to bring the action, although the period of limitations has run.

Second, plaintiff contends that the version of MCL 600.5851(1) that is applicable is the version that was in existence at the time of plaintiff's accident in 1981, and not the 1993 version which restricted the right to take benefit of the tolling provision. Further, plaintiff asserts that her cause of action accrued in 1981—well before the 1993 amendment of MCL 600.5851, and is therefore specifically subjected to the savings provision.

In reply brief, defendant State Farm contends that unpublished and published cases have held that the saving provision of MCL 600.5851(1) does not apply to no-fault actions. Moreover, defendant asserts, plaintiff's complaint is for payments of all invoices for all care which was the subject of the October 29, 2004, letter, and the December 17, 2004, denial, and further seeks payment for all subsequent invoices in 2004/2005. In other words, defendant asserts, plaintiff only recites claims accruing as of October 29, 2004.

Defendant moves for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by statute of limitations). A motion under MCR 2.116(C)(7) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence; the substance or content of the supporting proofs must be admissible in evidence. *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 26; 703 NW2d 822, 829 (2005). The allegations of the complaint are accepted as true unless contradicted by documentary submissions. *By Lo*, 26. A trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish that the moving party is entitled to immunity granted by law. *By Lo*, 26.

A no-fault action to recover PIP benefits can be filed more than one year after an accident and more than one year after a loss has been incurred if notice of the injury has been given to the insurer or if the insurer has previously paid PIP benefits for the injury. *Devillers v Auto Club Insurance Agency,* 473 Mich 562, 574; 702 NW2d 539 (2005). However, MCL 500.3145(1)

"limits *recovery* in that action to those losses incurred within the one year preceding the filing of the action." *Devillers*, 574 (emphasis in original). Furthermore, "[p]ersonal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense . . . is incurred." *Proudfoot v State Farm Mutual Ins Co,* 469 Mich 476, 483-484; 673 NW2d 739 (2003), citing MCL 500.3110(4).

The Revised Judicature Act (RJA) provides a general savings provision, codified at MCL 600.5851(1), which is applicable to persons who are insane. Section 5851(1) provides, in relevant part:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or *insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.* [Emphasis added.]

Under the 1915 Judicature Act, § 5851(1) stated that the savings provision applied to "any of the actions mentioned in this chapter." See *Cameron v Auto Club Ins Ass'n,* 263 Mich App 95, 99; 687 NW2d 354 (2004), lv gtd 472 Mich 899 (2005). However, the RJA was adopted by the Legislature in 1961 and the provision contained in § 5851(1) was changed from "any of the actions mentioned in this chapter" to "any action." *Cameron*, 99. In 1979, the Court decided *Rawlins v Aetna Casualty & Surety Co,* 92 Mich App 268; 284 NW2d 782 (1979), superseded by statute in *Cameron, supra* at 95. In *Rawlins,* the Court held that, as amended in 1961, § 5851(1) applied to claims brought under MCL 600.3145(1) of the no-fault act. *Rawlins, supra* at 277; see also *Cameron, supra* at 99-100. In 1993, the Legislature amended the language of § 5851(1) again from "any action" to "an action under this act," i.e., the RJA exclusively. *Cameron, supra* at 100.

The Court considered the pre-1993 amendment version of MCL 600.5851(1) in *Professional Rehabilitation Assoc v State Farm Mut Automobile Ins Co,* 228 Mich App 167, 171; 577 NW2d 909 (1998), upon which the current plaintiff relies, and held that the general savings provision applied to toll the "one-year back rule" contained in MCL 500.3145(1). In *Professional Rehabilitation,* the defendant insurance company denied payment to the plaintiff by letter on May 27, 1992. *Pro Rehab,* 168. The plaintiff commenced suit on May 12, 1994, attempting to recover four separate expenses, which were incurred in 1991. *Pro Rehab*, 168-169. The Court noted, "[w]ere it not for the savings provision of the Revised Judicature Act, we would hold that plaintiff's claim was time-barred." *Pro Rehab*, 175.

The *Cameron* Court recently considered whether the 1993 amendments to MCL 600.5851(1) from "any action" to "an action under this act" limited the scope of its application. *Cameron,* 100. The *Cameron* decision specifically addressed the issue regarding whether the general savings provision provided in MCL 600.5851(1) applies to toll the "one-year back rule" of the no-fault act, MCL 500.3145(1), to claims that accrued after the effective date of the amendment to MCL 600.5851(1). *Cameron*, 97. The Court held that "since the effective date of the 1993 amendment, the general savings provision of the RJA does not apply to actions commenced under the no-fault act." *Cameron*, 103.

The above-cited law was recently referenced in a Court of Appeals opinion directly on point with the facts of the current case, *Gulley v Automobile Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, decided April 25, 2006 (Docket No. 259012). In that case, the plaintiff guardian's ward suffered a severe brain injury on July 2, 1977, causing him to suffer from insanity from that date until the present. The ward further needed 24-hour attendant care from 1980 until the present. Thus, the *Gulley* Court noted, the plaintiff's claim for PIP benefits

began to accrue in 1980 when she began to provide attendant care services to the ward. The record showed the defendant insurer had made payments of PIP benefits. Because this was so, then, the plaintiff had one year after the most recent allowable expense to commence an action against defendant. The *Gulley* Court noted that the plaintiff filed her complaint on March 20, 2003, alleging that the insurer underpaid her for the attendant care she provided. However, under the "one-year back rule" provided in MCL 500.3145(1), the *Gulley* Court noted, the plaintiff's recovery would be limited to those losses incurred one year or less before the date on which the action was commenced, unless the plaintiff could avail herself of the insanity savings provision provided in MCL 600.5851(1).

The *Gulley* Court concluded that its plaintiff's claims were indeed tolled by the insanity provision provided for by the pre-1993 amendment version of MCL 600.5851(1) for the expenses plaintiff incurred during the time period of 1980 to September 30, 1993. However, the *Gulley* Court found, its plaintiff was not entitled to avail herself of the insanity savings provision provided for in MCL 600.5851(1) for the expenses she incurred during the time period of October 1, 1993, to March 19, 2002, because these expenses accrued after the effective date of the 1993 amendment to MCL 600.5851(1). Finally, the *Gulley* Court ruled that, pursuant to MCL 500.3145(1), its plaintiff was limited by the "one-year back rule" to those expenses incurred within the one year preceding the filing of the action. Thus, the *Gulley* Court found that its plaintiff could recover for the expenses from March 21, 2002, to March 20, 2003.

This Court finds the *Gulley* case directly on point and instructive. Like the *Gulley* Court, this case involves a plaintiff who accrued some claims before the 1993 amendment to the insanity savings provision, and some claims after. The Court is persuaded that, as in *Gulley*, those claims accruing on or before September 30, 1993, are tolled by the insanity savings

provision of MCL 600.5851. However, no claim is tolled by the insanity savings provision on or after October 1, 1993. Pursuant to MCL 500.3145(1), plaintiff is limited by the "one-year back rule" to those expenses incurred within the one year preceding the filing of this action, October 28, 2005. Thus, plaintiff can recover for the expenses from October 29, 2004, to the present. In sum, plaintiff may recover expenses incurred from her accident in 1981 to September 30, 1993; and from October 29, 2004 to the present; plaintiff may not recover expenses incurred from October 1, 1993, until October 28, 2004.

The Court notes that plaintiff's complaint does indeed refer to expenses incurred and not fully paid for from 2004 onward. It does not appear that plaintiff has alleged that expenses are outstanding for services rendered prior to 2004. For this reason, defendant in reply brief asked for sanctions, for plaintiff's refusal to agree to partial summary disposition of claims accruing before October 29, 2004. The Court is not persuaded to grant sanctions. Defendant brought the instant motion for partial summary disposition, to exclude claims it now says plaintiff has not brought. Further, the Court is persuaded that, in the event plaintiff does claim underpayment for past services rendered, the instant matter clarifies what may be recovered and is thus worth receiving a ruling from the Court.

For the foregoing reasons, defendant State Farm's motion for partial summary disposition is GRANTED IN PART, to the extent that plaintiff may not state claims for expenses incurred on or after October 1, 1993, until October 28, 2004; the motion is DENIED IN PART, to the extent that plaintiff may state claims for expenses incurred from the date of the accident until September 30, 1993, and from October 29, 2004 to the present. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date:

DMD/aac JUN - 9 2006

cc: L. Neal Kennedy, Attorney at Law
Nathan J. Edmonds, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

JUN - 9 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: Court Clerk